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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1040

COMMUNIST PARTY OF INDIANA, GUS HALL, JARVIS TYNER, SIMON BOORDA, JESSE REECE, MIKE BAYER, and RUTH NORRICK, Individually and on behalf of all other qualified voters similarly situated,

Appellants,

—v.—

EDGAR D. WHITCOMB, Individually and as Governor of the State of Indiana; KARL J. STIPHER and THURMAN DeMOSS, Individually and as members of the Indiana State Election Board; and INDIANA STATE ELECTION BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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HAMMOND DIVISION

JURISDICTIONAL STATEMENT

Appellants appeal from the Judgment of the United States District Court for the Northern District of Indiana, declaring that the oath contained in *Ind. Ann. Stat.* §29-3812 is severable and that, as so separated, the first portion is constitutional. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions and Orders

The memorandum and orders of the District Court of the Northern District of Indiana are unreported. They are set forth in the Appendix, *infra*, pp. 1a-6a. Decisions on Applications to this Court for stays are reported at 93 S. Ct. 16 and 93 S. Ct. 28.

Jurisdiction

This suit was brought pursuant to 42 U.S.C. §1983 and U.S. Const. Art. I, §10; Art. II, §1; Art. VI, Clause 2; Amendment I and Amendment XIV. Jurisdiction was based on the above provisions and on 28 U.S.C. §§1331, 1343, 2201, 2202, 2281 and 2284. The three-judge district court was asked to declare invalid and enjoin enforcement of *Ind. Ann. Stat.* §29-3812. The Memorandum and Order of the three-judge district court was entered on September 28, 1972; Appellants' Petition for Mandate to Enforce the Prior Order of the Court was denied on October 4, 1972; Appellants' Motion to Amend was denied on October 31, 1972; and Appellants' Notice of Appeal was filed in the district court on November 29, 1972.[1] The jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by 28 U.S.C. §1253. Cases supporting jurisdiction include *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583 (1972).

---

[1] Appellees in the instant case filed a Jurisdictional Statement also appealing the decision below on January 13, 1973. *Whitcomb* v. *Communist Party of Indiana*, No. 72-990.

Question Presented

Whether Appellants' right under Art. I, §2 and Art. VI, clause 3 of the Constitution, and the First and Fourteenth Amendments, are violated by the Indiana law conditioning access of Appellant party and its candidates to a place on the Indiana Ballot upon a commitment from the officers of Appellant party that it does not engage in constitutionally protected advocacy, i.e., the mere advocacy or teaching of abstract ideas, beliefs and principles as divorced from illegal action.

Statute Involved

The statute in controversy in this case is *Ind. Ann. Stat.* §29-3812 which reads as follows:

> 29-3812. Elections—Ballots—Certain political parties barred—Doctrine and purposes of party—Investigation.—No political party or organization shall be recognized and given a place on or have the names of its candidates printed on the ballot used at any election which advocates the overthrow, by force or violence, of the local, state or national government, or which advocates, or carries on, a program of sedition or of treason, and which is affiliated or cooperates with or has any relation with any foreign government, or any political party or group of individuals of any foreign government. Any political party or organization which is in existence at the time of the passage of this act [chs. 28-60 of this title], or which shall have had a ticket on the ballot one or more times prior to any election, and which does not advocate any of the doc-

trines the advocacy of which is prohibited by this act, shall insert a plank in its platform that it does not advocate any of the doctrines prohibited by this act. No existing or newly-organized political party or organization shall be permitted on or to have the names of its candidates printed on the ballot used at any election until it has filed an affidavit, by its officers, under oath, that it does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government. The affidavit herein provided for shall be filed with the state election board or the county election board having charge of the printing of the ballot on which such ticket is to appear. The election board with which such affidavit is filed shall make, or cause to be made such investigation as it may deem necessary to determine the character and nature of the political doctrines of such existing or proposed new party and the expense of such investigation by the state election board shall be paid out of the general funds of the state treasury not otherwise appropriated, provided the amount of such appropriation shall not exceed five hundred dollars [$500]; and the expense of the investigation by the county election board shall be paid out of the funds in the treasury, not otherwise appropriated, provided the amount of such appropriation shall not exceed three hundred dollars [$300], and if the board is of the opinion that such existing or proposed new party advocates doctrines which are

in violation of the provisions of this act [chs. 28-60 of this title], or that any of the statements in said affidavit are false, the board shall not permit such ticket or candidates on the ballot. [Acts 1945, ch. 208, §117, p. 680.]

Statement of the Case

The appellants are the Communist Party of Indiana, a new political party in Indiana seeking a position upon the Indiana Ballot; Gus Hall and Jarvis Tyner, the Party's candidates in 1972 for President and Vice President of the United States, respectively, who intend to seek those offices in 1976; Simon Boorda, Jesse Reece, and Mike Bayer, officers of the Communist party of Indiana who desire that the Party appear on the Indiana Ballot in future local, state and federal elections; and Ruth Norrick, a registered voter in Lake County, Indiana who, on behalf of all qualified voters similarly situated, desires that the Party and its candidates be placed upon the Indiana Ballot in future elections, in order that she and the class she represents may be able to vote for such candidates. The Appellees are Edgar D. Whitcomb, Karl J. Stipher and Thurman DeMoss, individually and together as the Indiana State Election Board. The Appellees, acting on behalf of the State Election Board must certify all new political parties before they may be placed upon the Indiana Ballot.

Before a new political party will be admitted to a position on the ballot in Indiana, *Ind. Ann. Stat.* §29-3801 *et seq.* requires such party to submit to Appellees for certification, petitions signed by registered voters equalling "one-half of one-percent [½%] of the total vote of all parties cast in

the state for Secretary of State at the last preceding general election." In pursuit of their goal, Appellant party gathered the requisite number of signatures on petitions. These petitions were tendered to Appellees prior to the statutory deadline of September 1, 1972, and complied in all respects with *Ind. Ann. Stat.* §§29-3801 *et seq.*, except for the absence of an accompanying affidavit required by §29-3812:

> . . . that it does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government. *Ind. Ann. Stat.* §29-3812 (Burns' 1969 Repl.).

Appellants did not comply with the statute because, in their opinion, it required an oath broader than permitted by the Constitution.

The Appellee Election Board, confronted with the fact that the Appellant party had satisfied all statutory requirements to be placed on the ballot, except submitting the aforementioned oath, requested an opinion from the Attorney General of Indiana whether Appellees should prohibit Appellant party's candidates from the ballot.

The Attorney General of Indiana in Official Opinion No. 11, dated August 28, 1972, answered:

> It is, therefore, my Official Opinion that the provisions and requirements of IC 1971, 3-1-11-12, as found at Burns' Ind. Stat. Ann. *Section 29-3812* (1969 Repl.) are currently valid and enforceable, and prohibit from

> appearing on the ballot the name of any political candidates who, or parties whose officers, refuse to sign the affidavit required by that statute.
>
> The Indiana law recited in the foregoing analysis clearly prohibits placing on the ballot any so-called political party or organization which advocates the overthrow of the government or carries on a program in any way affiliated with a foreign government or related to any political group within any foreign government.
>
> • • • • •
>
> Therefore, the Communist Party would not be eligible to appear on the Indiana ballot even if its officers should sign an affidavit because that would be an obvious perjury in view of the Communists' stated purposes. And those Indiana officials who would be responsible for placing the Communist Party on the ballot could be subject to Federal criminal prosecution as well under the *Smith Act* and the *Communist Control Act.*
>
> There is no constitutional or common-sense requirement for a free state to fertilize the seeds of its own destruction.[2]

Shortly after receiving this Opinion the Election Board, relying upon *Ind. Ann. Stat.* §29-3812 and the Opinion, re-

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[2] In concluding that the Indiana statute was both applicable and constitutional, the Attorney General surveyed a number of recent court decisions, including one by the Indiana Supreme Court holding that the Socialist Labor Party had, in 1968, submitted insufficient affidavits under the act, and therefore could not appear on the ballot. *State ex rel. Socialist Labor Party* v. *State Election Board of Indiana,* 241 N.E.2d 69 (1968) (Ind. S.C.). The whole of Official Opinion No. 11 is set out in the Appendix, *infra,* pp. 9a-19a.

fused to accept or examine the petitions of Appellant party. This action barred Appellant party and its candidates for public office from the ballot.

Thereafter, Appellants filed suit in the United States District Court for the Northern District of Indiana, requesting the convening of a three-judge court, the issuance of an injunction, and a declaratory order that *Ind. Ann. Stat.* §29-3812 was unconstitutional. The complaint alleged that the Indiana statute was vague and overbroad in violation of the First and Fourteenth Amendments, constituted a Bill of Attainder prohibited by Art. I, §10 of the Constitution, contravened the supremacy clause, Art. VI, Clause 2 of the Constitution, and unlawfully exceeded the oath of office provided in Art. II, §1 of the Constitution.

On September 28, 1972, a three-judge court was convened. At this hearing actions were also heard involving the American Independent Party and the Indiana Peace and Freedom Party, which had also been refused certification because of improper affidavits filed pursuant to the aforementioned statute.

The only issue presented by Appellants at this hearing was the constitutionality of *Ind. Ann. Stat.* §29-3812. The Court in its Memorandum and Order, Appendix, *infra*, pp. 2a-3a, ruled:

> We have concluded that the loyalty oath, so-called, contained in *Ind. Ann. Stat.* 29-3812 is severable and that, as so separated, the first portion is constitutional and the second segment is unconstitutional. That is, that portion of the statute providing 'that it does not advocate the overthrow of local, state or national gov-

> ernment by force or violence,' is constitutional and hence enforceable by Indiana.[3]

The Court then ordered that Appellees accept from Appellant Communist Party an oath consistent with its opinion, and in the event such an oath was submitted, the Court ordered that Appellees certify said Party and cause its inclusion on the national ballot printed in the State of Indiana. Under continued protest that the Indiana statute was unconstitutional on its face, but to assure the Appellant Party and Appellant candidates a ballot position in 1972, an effort was made to comply with the Court's opinion.

Because the Appellant party is at the very least constitutionally entitled to engage in advocacy of overthrow of government that is not related to imminent action, and because Official Opinion No. 11 of the State Attorney General stated that it "would be an obvious perjury" if the officers of the Communist Party should sign an affidavit pursuant to *Ind. Ann. Stat.* §29-3812, the officers of Appellant party filed an affidavit that the Party does not:

> . . . advocate the overthrow of local, state or national government by force or violence. The term advocate as used herein has the meaning given it by the Supreme Court of the United States in Yates v. United States, 354 U.S. 298 at 320, "the advocacy and teaching of concrete action for the forcible overthrow of the government, and not of principles divorced from action." (Appendix, *infra*, p. 8a.)

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[3] The district court declared unconstitutionally broad and vague so much of the Indiana statute as required an affidavit of non-association with foreign governments, political parties, organizations or groups. Appellees in the instant appeal have separately appealed from that portion of the Order. *Whitcomb* v. *Communist Party of Indiana* (No. 72-990).

The State Election Board upon the submission of this oath refused to certify Appellant party and include it upon the Ballot. (The oaths of the other plaintiff political parties were accepted.) The reasoning of Appellees, as expressed to Appellants at a hearing held on September 29, 1972, was that the term "advocate" as required by *Ind. Ann. Stat.* §29-3812, includes the advocacy and teaching of abstract ideas, beliefs and principles divorced from action.

Immediately thereafter Appellants filed a Petition for Mandate to Enforce the Prior Order of the Court. This petition was denied by the district court on October 4, 1972. Appellants' Motion to Amend was also denied by the Court on October 31, 1972.[4] The Motion to Amend requested that the district court enjoin enforcement of the statute outright and at the very least to declare "that the portion of *Ind. Ann. Stat.* §29-3812 providing 'that it [the certifying Party] does not advocate the overthrow of local, state or national government by force or violence' is constitutional only insofar as it prescribes advocacy directed at primary unlawful action as distinguished from

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[4] In addition to these proceedings, on September 29, 1972, the Appellees made simultaneous applications with the district court and the Supreme Court to reconsider the decision and to stay the mandate. On October 5th, the Appellants filed in the Supreme Court a response in opposition and a cross motion to enforce the district court mandate and to stay so much of the district court decision as favored Appellees. The cross motions were denied by the full Court on October 5th. 93 S. Ct. 28. On October 6th, the Appellants filed in this Court an emergency application for stay of the order of the district court. It was denied on the same day by Mr. Justice Rehnquist. 93 S. Ct. 18. On January 13, 1973, the Appellees in the instant appeal filed a Jurisdictional Statement appealing the district court decision to the extent that the Indiana statute was declared in part unconstitutional. *Whitcomb v. Communist Party of Indiana*, No. 72-990.

advocacy of abstract doctrine." In effect, therefore, the district court has not only sustained the Indiana requirement of a loyalty oath, but it has accepted the ruling of the Appellees that the term "advocacy" as used in *Ind. Ann. Stat.* §29-3812 precludes merely expressing abstract ideas, beliefs and principles divorced from action.

The Question Is Substantial

The substantiality of the question presented in this appeal follows from this Court's actions in the case of *Socialist Labor Party* v. *Gilligan,* 406 U.S. 583 (1972), where the Court would have reviewed the constitutionality of Ohio's requirement of a political party loyalty oath but for the fact that the issue was not presented in a posture ripe for judicial resolution. But there is no possibility of unripeness here. Appellants were denied a ballot position solely because of the loyalty oath requirement, and they have been threatened with perjury sanctions. Despite their unsuccessful efforts to comply with the district court's decision these deprivations entitled them to present the full range of constitutional challenges that are raised in the complaint. *Cramp* v. *Board of Public Instruction,* 368 U.S. 268 (1961). Similarly, there is no issue of mootness. The class scope of the action, the request for broad injunctive and declaratory relief, the allegations of future harm, the fact that involved in the case is a ". . . problem . . . 'capable of repetition, yet evading review' . . .", all make it clear that this is a live case fit for appellate review. *Moore* v. *Ogilvie,* 394 U.S. 814, 816 (1969). Compare *Brockington* v. *Rhodes,* 396 U.S. 41 (1969).

Unlike the Massachusetts oath in *Cole* v. *Richardson*, 31 L.Ed.2d 593, 603 (1972), the Indiana oath is something "more than an amenity," for despite their efforts to comply with the district court order, Appellants have been denied and will continue to be denied their right to run candidates for public office, to stand for public office, and to vote for candidates of the Communist Party, solely because of the oath. Moreover, Appellants' party and candidates, again unlike the situation of the plaintiff in *Richardson*, have been threatened specifically with perjury prosecution if they submit an oath in the form required by Appellees.

1. *The Decision of the District Court Is Inconsistent With Controlling Decisions of This Court Concerning First Amendment Rights of Advocacy.*

Once the district court rendered its initial decision, the Appellants were faced with a dilemma that was compounded when all avenues for emerging relief were exhausted fruitlessly. Appellants could decline to make any effort to comply with the district court's order, and thereby relinquish all possibility of participating in the 1972 election. On the other hand, Appellants could sign an affidavit in the form required by the Appellees (under the district court's opinion), and thereby risk prosecution for perjury (Ind. A.G. Official Opinion No. 11, Aug. 22, 1972, p. 9, Appendix, *infra*, p. 19a) and also relinquish the opportunity to seek vindication of their constitutional rights on appeal (*Socialist Labor Party* v. *Gilligan*, 406 U.S. 583 (1972)).

Obviously, neither alternative was satisfactory. Hence, under protest, Appellants filed an affidavit (Appendix, p. 8a) that insulated them from good faith perjury prosecution and reserved their fundamental constitutional claims.

When the State Election Board rejected this affidavit, and the district court confirmed the rejection, Appellants were irreparably denied their constitutional rights. Significantly, the rejection of the affidavit was also rejection of the principle of cases such as *Yates* v. *United States,* 354 U.S. 298, 320 (1957); *Noto* v. *United States,* 367 U.S. 290, 297-98 (1961), and *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969), which firmly establish the First Amendment right to engage in advocacy of resort to violent overthrow of government as long as the advocacy does not involve "incitement to imminent lawless action." *Brandenburg* v. *Ohio, supra,* 395 U.S. at 449. As this Court has made abundantly clear, the principle of the decisions precluding criminal prosecution for engaging in advocacy not imminently inciting lawless conduct precludes the conditioning of statutory rights on overly broad loyalty oaths. E.g., *Cole* v. *Richardson,* 31 L.Ed.2d 593, 600 (1972); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967). See generally, *Baird* v. *State Bar of Arizona,* 401 U.S. 1, 6 (1971).[8]

In *Cole* v. *Richardson,* the majority of this Court concluded that the proper test in evaluating loyalty oaths is whether the oath exacts a commitment to refrain only from the use of illegal activities or whether the oath is so broad and vague that it exacts a commitment to refrain from entertaining "political beliefs" or from engaging in "protected speech activities." 31 L.Ed.2d at 600, 602. Under this test the majority upheld the constitutionality of the Massachusetts loyalty oath by reading it narrowly to proscribe only the use of "illegal and constitutionally unpro-

[8] Of course the meaningful threat of perjury prosecution made by the Indiana Attorney General may well render moot any possible question of a difference in standards in civil and criminal deprivations.

tected force to change the constitutional system." 31 L.Ed. 2d at 602.

The oath required under *Ind. Ann. Stat.* §29-3812, as interpreted by the Appellees and the District Court, goes substantially beyond the explication approved in *Richardson*. It effectively disqualifies a political party and its candidates from access to the ballot if such party advocates the abstract principle of overthrow of local, state, or national government by force or violence. Thus, Appellants are precluded from participating in the political process. On the other hand, as interpreted by this Court, the oath examined in *Richardson* does not require anyone to refrain from advocating or believing in any objectionable ideas.[6] The Indiana oath regrettably does. And it cannot be fairly construed to allow such beliefs and advocacy. See *State ex rel. Socialist Labor Party* v. *State Election Board of Indiana*, 241 N.E.2d 69 (1968) (implied). It is therefor unconstitutionally broad and vague. See, e.g., *Whitehill* v. *Elkins*, 389 U.S. 54 (1967); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Cramp* v. *Board of Public Instruction*, 368 U.S. 268 (1961).

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[6] The oath involved in *Richardson* required every person entering the employ of the Commonwealth (presumably including elected officials) to take the following oath:

> I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method.

2. *The Decision of the District Court Is Inconsistent With Controlling Decisions of This Court Recognising the First Amendment Rights to Stand for Public Office and to Vote for Candidates of One's Choice, and Exceeds the Constitutionally Prescribed Oath of Office.*

Appellant party's right to qualify as a new political party and to gain access to the Indiana ballot is a right indisputably protected by the First Amendment, as is the correlative right of Appellant candidates. "[T]he right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank among our most precious freedoms." *Williams* v. *Rhodes,* 393 U.S. 23, 30 (1968). Access to the ballot is included within the First Amendment's protection: "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." *Id.* at 31.

The First Amendment's protection of the rights of the individual voter-appellants must also be considered. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims,* 377 U.S. 533, 555 (1964). A fundamental principle in our democracy is that "the people should choose whom they please to govern them" and "this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself." *Powell* v. *McCormack,* 395 U.S. 486, 547 (1969). The assertion by the Attorney General in his Official Opinion No. 11—"There is no constitutional or common sense requirement for a free state to fertilize the seeds of its own destruction"—flies in

the face of the First Amendment and violates prior decisions of this Court.

The electorate should have the unhampered opportunity to cast their votes at the polls for the widest variety of political programs. The act of casting a ballot is the ultimate purpose behind the exercise of First Amendment rights. What good is it to be able to express one's views freely if there is no ultimate opportunity to try to elect a government that shares those views? To foreclose any political party or candidate from the electoral process because of ideology or because they engage in constitutionally protected advocacy destroys the central function of the First Amendment. Indeed, to so foreclose a party or candidate from the ballot is not only constitutionally intolerable, it is also counterproductive. See generally, T. Emerson, *The System of Freedom of Expression,* p. 202 (1970).

Even assuming government has a subordinating interest in denying public office to those who do not adhere to the principles of the Constitution and orderly government, cf. *Cole* v. *Richardson,* 31 L.Ed.2d 593 (1972); *Healy* v. *James,* 33 L.Ed.2d 266 (1972), denial of ballot position is not the kind of less drastic alternative allowed to government by the Constitution. E.g., *United States* v. *Robel,* 389 U.S. 258 (1967). The constitutional oath required of office takers should be quite sufficient to serve any government need. See *Bond* v. *Floyd,* 385 U.S. 116 (1966).

Appellants contend that no oath or political test may be imposed on candidates for office and their parties, as opposed to office takers. However, if any oath may be required, it must be limited to the oath that may constitutionally be imposed on the office taker. Hence, simple

affirmation to support the Constitution is all that may be required. U. S. Const. Art. II, §1, cl. 8; Art. VI, cl. 3. These provisions and the First Amendment combine to permit an oath of office or candidacy that is no more far reaching in its substance. See *Cole* v. *Richardson*, 31 L.Ed.2d 593 (1972); *Connell* v. *Higginbotham*, 403 U.S. 207 (1971); *LSCRRC* v. *Wadmond*, 401 U.S. 154 (1971); *Bond* v. *Floyd*, 385 U.S. 116 (1966) (semble); cf. *Powell* v. *McCormack*, 395 U.S. 486 (1969), where this Court invalidated any test for congressional office other than those that were expressly prescribed in the Constitution. As Chief Justice Vanderbilt of the New Jersey Supreme Court held under the New Jersey Constitution, there is nothing in the text nor in the history of the Constitution "that lends countenance to the idea that the Legislature was authorized to impose oaths in addition to those set forth in the Constitution on the classes of public officials covered thereby." *Imbrie* v. *Marsh*, 3 N.J. 578, 71 A.2d 352, 360 (1950).

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

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